Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 85, Original

STATE OF TEXAS,
Plaintiff,

VERSUS

STATE OF OKLAHOMA,
Defendant.

RESPONSE OF THE STATE OF OKLAHOMA TO MOTION FOR LEAVE TO FILE COMPLAINT

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No. 85, Original

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STATEMENT OF THE CASE

This litigation was commenced by the State of Texas alleging that a dispute exists as to the boundary between the State of Texas and the State of Oklahoma in and adjacent to Lake Texoma. The State of Texas specifically asks that the boundary be established as the south cut bank of the Red River as it existed prior to the construction of the Denison Dam.

The State of Oklahoma and the State of Texas have been parties in numerous controversies concerning the location of the boundary at various points along the Rio Roxo de Nachitoches or Red River. Although there has been considerable litigation the general history of the estab-

lishment of the boundary is subject to brief summarization. From the 100th meridian of longitude, the western border of Oklahoma, to the eastern border of Oklahoma the states share a common boundary of some 539 miles.

The southern boundary of the State of Oklahoma was established by virtue of the Treaty of 1819, 8 Stat. 252 (1821), as a part of the boundary between the United States and the possessions of Spain on the North American Continent (New Spain). The definition of the boundary as contained in the treaty was construed by the Court in *United States* v. *Texas,* 162 U.S. 1, 16 S.Ct. 725, 40 L.Ed. 867 (1895) at 90, and the Court held:

> ". . . [I]t is ordered, adjudged, and decreed that the territory east of the 100th meridian of longitude, west and south of the river now known as the north fork of Red river, and north of a line following westward, as prescribed by the treaty of 1819 between the United States and Spain, the course, and along the south bank, both of Red river and of the river now known as the Prairie Dog Town fork or south fork of Red river. . . ."

This construction of the Treaty was followed and affirmed in *Oklahoma* v. *Texas,* 256 U.S. 70, 41 S.Ct. 420, 65 L.Ed. 831 (1921). The Court at page 93 held that the decision of the Court in *United States, supra,* was *res judicata* and binding on the parties in any subsequent suit between the states of Oklahoma and Texas, and that the southern boundary of Oklahoma was the south bank of the Red River for the entire course of the said river from the 100th degree of west longitude to the easterly boundary of Oklahoma.

Subsequently, this Court in *Oklahoma* v. *Texas,* 261 U.S. 340, 43 S.Ct. 376, 67 L.Ed. 687 (1923), provided a definition as to what constituted the south bank. Such definition at 341-42 was as follows:

> "The South bank of the river is the waterwashed and relatively permanent elevation or acclivity, commonly called a cut bank, along the southerly side of the river, which separates its bed from the adjacent upland, whether valley or hill, and usually serves to confine the waters within the bed, and to preserve the course of the river.
>
> "The boundary between the two states is on and along that bank at the mean level attained by the waters of the river when they reach and wash the bank without overflowing it.
>
> "At exceptional places where there is no well-defined cut bank, but only a gradual incline from the sand bed of the river to the upland, the boundary is a line over such incline, conforming to the mean level of the waters, when at other places in that vicinity they reach and wash the cut bank without over-flowing it."

As a result of the partial decree in the 1923 case and other partial decrees arising from the same controversy, a boundary commission was established to take evidence, find facts and report to this Honorable Court. In 1925 said Commission filed a documentary report styled as follows:

SUPREME COURT OF THE
UNITED STATES

October Term, 1925
No. 13, Original

THE STATE OF OKLAHOMA,
Complainant,
Vs.
THE STATE OF TEXAS,
Defendant,
THE UNITED STATES,
Intervenor.

THIRD REPORT OF THE
BOUNDARY COMMISSIONERS.

261 U.S. 340

At page 41 of the Report of the Boundary Commissioners appears the following entry:

VII.

IN
GRAYSON COUNTY, TEXAS,
OPPOSIVE
MARSHALL AND BRYAN COUNTIES,
OKLAHOMA.

Public Hearing:
Sherman, Texas, May 7, 1925

We found no avulsive changes in the position of the Red River in this County and make no surveys.

Thereafter in 1938 Congress authorized the construction by the United States Army Corps of Engineers at a

site north of the City of Sherman, Grayson County, Texas and some three miles southwest of Colbert, Bryan County, Oklahoma to furnish hydro-electric power and downstream flood control. Upon completion of construction and closing of the gates the resulting impoundment of waters primarily to the west and north formed Lake Texoma. The State of Oklahoma is unaware of the location of the south cut bank, the boundary as established by the Treaty of 1819. The river downstream of the power plant has been re-channeled, and Oklahoma is not aware as to where it is situated in proximity to the boundary as determined in the Treaty of 1819, and the Survey of 1908 by the United States Engineers' Office, Dallas, Texas, Red River Sheets 29, 30, 31, 32, 33, 34 and 35.

The Federal Energy Regulatory Commission (F.E.R.C.) is charged with the duty of regulating sales of electrical power in interstate commerce. 16 U.S.C. § 824 (1976). Under Docket No. EL-9578, the F.E.R.C., among other things, is attempting to adjudicate the location of the boundary between the States of Oklahoma and Texas. The State of Texas is a party-Intervenor in the F.E.R.C. proceeding. The State of Oklahoma is not a party-Intervenor in the F.E.R.C. proceeding. Oklahoma does not consider the F.E.R.C. a competent forum to determine the boundary or protect the State of Oklahoma from violation of its sovereign territorial rights by Texas. The State of Oklahoma notes that adjudication of such disputes between sovereign states is under the original and exclusive jurisdiction of this Court. The Constitution of the United States of America, Article III, Section 2; 28 U.S.C. § 1251(a)(1) (1976).

ARGUMENT AND AUTHORITY

I.

THERE IS AN ACTUAL JUSTICABLE CASE AND CONTROVERSY.

This Court has original and exclusive jurisdiction of a case or controversy between two or more states by virtue of the Constitution of the United States of America, Article III, Section 2 and 28 U.S.C. § 1251(a)(1) (1976). The instant case involves an actual controversy in that the boundary between Oklahoma and Texas was obliterated by building of Denison Dam and flooding by Lake Texoma. The impoundment of such waters obscures the location of the boundary as respects the Oklahoma counties of Marshall, Bryan and to a lesser extent Love. The State of Texas has the burden of showing any shift in the boundary due to accretion resulting from the building of the Denison Dam by the U.S. Corps of Engineers. The instant action is analogous in many ways to *Mississippi* v. *Arkansas,* 415 U.S. 289, 94 S.Ct. 1046, 39 L.Ed.2d 333 (1974). In that case the action was instituted by Mississippi against Arkansas due to the pendency of private litigation in the State Courts of Arkansas. The State of Oklahoma would respectfully submit that this Court has historically considered such boundary disputes to be obligatory in any case where there is an actual controversy. In the instant case the F.E.R.C. is purporting to adjudicate such dispute, a matter within the sole province of this Court, without all parties before it.

II.
THE COURT IS THE SOLE FORUM WITH JURISDICTION TO HEAR AND ADJUDICATE THE CONTROVERSY.

The State of Oklahoma has not intervened in the F.E.R.C. in Docket No. EL-9578 for reason that the F.E.R.C. has not been granted authority to hear and adjudicate such controversies. As a non-party, the decision of the F.E.R.C. does not and cannot bind the State of Oklahoma, if it can be assumed arguendo to have the authority to review such controversies. See *Oklahoma* v. *Texas,* 256 U.S. 70, 41 S.Ct. 420, 65 L.Ed. 831 (1921). The decision may, however, affect citizens of Oklahoma and will doubtless result in a filing of an original action in this Court to clear encumbrances from any actions by the F.E.R.C. purporting to affect the sovereign rights of Oklahoma or purport to allow Texas to invade such.

The State of Oklahoma would respectfully submit that by virtue of the Constitution of the United States of America, Article III, Section 2 and 28 U.S.C. § 1251(a)(1) (1976) this Court's authority in such cases and its exclusive grant of subject matter jurisdiction preclude any other forum from entering therein. *Durfee* v. *Duke,* 375 U.S. 106, 84 S.Ct. 242 (1963). See also *New York* v. *Connecticut,* 4 U.S. 1, 4 Dall. 1, 1 L.Ed. 715 (1799).

CONCLUSION

The State of Oklahoma suggests that there is an actual controversy involving a conflict of the sovereign interests of Oklahoma and Texas and that this Court is the only competent forum in which Oklahoma can obtain an adjudication of its interests.

Respectfully submitted,

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